Supreme Court, U.S.
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No. 91-1650

In The

Supreme Court of the United States

October Term, 1991

ROBERT WAYNE LEE,

Petitioner,

vs.

BAPTIST MEDICAL CENTER OF OKLAHOMA, WC; DR. SCOTT CALHOON; OKLAHOMA HEALTHCARE CORPORATION; AND BAPTIST MEDICAL PLAZA ASSOCIATES, LED.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY TO BRIEF IN OPPOSITION

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May, 1992

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OPINIONS BELOW

The United States Court of Appeals for the Tenth Circuit issued its opinion (No. 90-6013) on November 6, 1991 and denied petitioner's Motion for Rehearing and Suggestion for Rehearing En Banc on January 16, 1991. The Appeal was from a number of orders by the Trial Court and Judgment was entered in favor of respondent of December 12, 1989, by the Honorable Ralph G.

Thompson, United States District Judge for the Western District of Oklahoma.

STATEMENT OF THE CASE

Petitioner's Statement of the Case is made pursuant to Rule 24.1 and Rule 24.4 and made in reply to numerous inaccuracies and omissions in the Respondents' Statement of the Case. Respondents assert in their Statement of the Case that the Petitioner has failed to present with accuracy, brevity, and clearness whatever is essential to a speedy and adequate understanding of the points requiring consideration. Petitioner submits that his original Statement of the Case provides an accurate and clear description of all that is essential for a ready and adequate understanding of the points requiring consideration.

Respondents assert in their Statement of the Case that there was no evidence of an "unauthorized disclosure" based on "Malicious" [sic] and "self interest". In fact, there is evidence that the disclosure of Petitioner's medical condition to the media was unauthorized (Affidavit of Robert Wayne Lee). The petitioner filed said affidavit in response to Respondents' Motion for Summary Judgment. There has been no evidence ever presented that the Petitioner consented to and authorized Dr. Calhoon to make statements regarding his medical condition to the media.

Respondents continually assert that Dr. Calhoon was only attempting to explain the medical facts pertinent to his defense of this lawsuit in informing the media that

petitioner had AIDS. Petitioner has and continues to assert that the information released by Dr. Calhoon was not relevant to the medical malpractice action and this is supported by the District Court's Order dated June 27, 1989, as only "apparently pertaining" to the action. The medical records did not indicate a connection between the colostomy surgery and petitioner's condition of being exposed to the HIV virus. Further, the answers filed by the Respondents do not allege *any* connection between the necessity of the surgery and the Petitioner's having AIDS.

Secondly, the Respondents assert that there is no evidence that any of the defendants withheld medical records. This is clearly erroneous. The Petitioner and his counsel both repeatedly made attempts to obtain the complete medical records and were denied this request. A Motion for Immediate Production of Documents was filed before the District Court. Finally, after the filing of the lawsuit, petitioner was graciously provided with his medical records.

Further, respondents allege that there was a connection between the medical care of petitioner and AIDS. This is inaccurate. In his own deposition, Dr. Calhoon stated that he did not learn that the petitioner was an AIDS carrier until two days after the surgery. (Deposition of Dr. Calhoon). It is beyond the stretch of the imagination to see how respondents can maintain the position that the comments made to the reporter could be concerned with the operation performed when he performed all the care without knowledge of the condition.

The petitioner's original Statement of the Case coupled with the showing of these inaccuracies of the Respondents' Statement of the Case represent a clear, concise, and accurate representation of all that is essential for this Court to make a ready and adequate understanding of the points requiring consideration in accordance with Rule 14.5 of the Rules of the Supreme Court.

ARGUMENT

PETITIONER'S RIGHT OF PRIVACY UNDER THE UNITED STATES CONSTITUTION IN SEEKING DAMAGES FOR DISCLOSURE OF HIS HIV CONDITION OUTWEIGHS THE FIRST AMENDMENT'S RIGHT OF ACCESS TO COURT PROCEEDINGS.

Petitioner respectively submits to this Final Court the following in hopes that it will not fall on deaf ears, the relief sought is not for vindication of this Petitioner, it is for protection of every citizen henceforth, and a resounding reformation of what the Bill of Rights is supposed to stand for.

1. Fact: The Petitioner never consented to have an HIV test run.

2. Fact: The Petitioner so swore to in an affidavit filed in the case herein.

3. Fact: The Respondent, Dr. Scott Calhoon, was the treating physician at all times pertinent herein.

4. Fact: The Respondent, Dr. Scott Calhoon's name appears on the request for an HIV test and only his name.

5. Fact: The Respondent, Dr. Scott Calhoon, has never produced any consent form authorizing the unauthorized intrusion into the petitioner's body by extracting blood and sending it to a state lab for an HIV test.

6. Fact: The Respondent, Dr. Scott Calhoon, having been sued for malpractice, totally unrelated to the unauthorized HIV testing, knew or should have known that no authorization had ever been obtained for such a test and his public disclosure to the press the day he was served with a summons can in no way be protected by a disclosure statute of the State of Oklahoma or the First Amendment to the United States Constitution.

Unless this Court, the Final Tribunal to which the Petitioner will ever be able to voice this injustice accepts certiorari there will be "a chilling effect" upon access to all courts. All people, not only people who have tested positive for HIV, would fear the halls of justice, afraid that the defendant in retaliation for being sued would disclose irrelevant medical history that would devastate them and their loved ones. In the present case, the defendant was a licensed medical Doctor and presumably knew about the laws governing physician-patient confidentiality. The complaint that he was served with, and which he responded to, the day after being served, made no mention of AIDS or HIV. The Respondents assert arguments about burden of proof and a state statute, which is totally inapplicable in this case, to mislead this Court as to the real issue which is the Constitutional right to privacy.

The denial of a person's right to privacy deprives them of one of the most fundamental rights of the Constitution. The right of privacy is granted in the concept of personal liberty embodied in the Fourteenth Amendment, having roots in the First, Fourth, Fifth, and Ninth Amendments. *Doe v. Shady Grove Hospital,* 598 A.2d 507, 512 (Md. App. 1991) quoting *Roe v. Wade,* 410 U.S. 113, 152-153 (1973). The facts in *Doe v. Shady Grove Hospital,* 598 A.2d 507 (Md. App. 1991) are almost exactly the same as in the present case. In *Doe,* the appellant was diagnosed as having AIDS while being treated for pneumonia. The appellant informed other people, including members of his family, of his AIDS diagnosis. The patient never authorized such disclosure. The Maryland Appellate Court held that this unauthorized disclosure made out a patent violation of the Right to Privacy. *Id.,* at 512. The Court went on to further state that the dissemination of the patient's name in the media would result in even a greater violation of the person's privacy than would occur by simply telling one's family. *Id.* The protection of one's privacy is a sufficiently compelling governmental interest to support limiting the public's right of access to medical information. *Id.*

The application of the principles set forth in *Doe,* shows that the interest in one's privacy outweighs the public's and Dr. Calhoon's interest. The Tenth Circuit held that Dr. Calhoon's interest in protecting his good name and reputation is compelling. Obviously, there is enough conflict among the Circuits to warrant examination by this Court.

In *Doe,* the Court addressed the fear that this Petitioner has repeatedly asserted. This Court held that to

allow disclosure would have the effect of making potential Plaintiffs, who believe their rights were violated, loath to bring their complaints to court as the end result will be further and ever more widespread violation of their "protected" rights. *Id.* at 513. It is certainly clear that this is exactly what happened in the instant case. Mr. Lee filed a petition for medical malpractice based upon unnecessary, unauthorized surgery. What resulted was a violation of his right to privacy.

In Respondents' Brief in Opposition, Respondents assert that Petitioner has not shown any indication of an invasion of this right to privacy, and that this effect upon Petitioner's life is not a fact for consideration. The arguments above certainly show that Petitioner's right to privacy has been violated, and has been supported recently in the Courts of this land. *See Doe v. Shady Grove Hospital,* supra; *Nolley v. County of Erie,* 776 F. Supp. 715 (W.D.N.Y. 1991). Respondent asserts that the public policy supporting the physician-patient privilege is not thwarted by discussion of one's medical condition with the media. It is beyond logic how Respondent can present this argument to this Court as being more compelling than the Constitutional Right to Privacy. It is the prevailing view among AIDS experts that a person who has AIDS desires to keep this information as quiet as possible, sharing it only with those people whose support can be counted on. *Doe,* 598 A.2d at 516. This most certainly does not mean allowing a doctor to tell the world at large, as done in this case. In *Woods v. White,* 689 F. Supp. at 876, the court held that it is difficult to imagine that information about having AIDS is not information of the most personal kind, or that an individual would not have an

interest in protecting the dissemination of such information. *Id.*

As to Respondents' contention that there are no facts to support Petitioner's argument that he has been forced to change his job, name and residence, Petitioner asserts that there is a great deal of existing argument for support of damages. In *Doe v. Shady Grove Hospital*, 598 A.2d 507 (Md. App. 1991), the Court held that the revelation of one's name to the public-at-large, coupled with the diagnosis of AIDS, could place the person's livelihood in jeopardy. *Id.* at 515. Everyone this person meets would know of this condition. *Id.* In the instant case, Petitioner's life, livelihood, and pursuit of happiness has certainly been jeopardized. Dr. Calhoon's dissemination of the Petitioner's name and condition has drastically changed Mr. Lee's life.

CONCLUSION

Petitioner has been deprived of one of the Constitution's most fundamental rights: the right to privacy. As there is more than adequate case law and public policy to conflict with the Tenth Circuit's decision, Petitioner submits that there is a foundation for review by this Court and prays that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

DIANNA S. WISDOM
(Counsel of Record)
3120 Northwest 23rd Street
Oklahoma City, Oklahoma 73107
(405) 528-1888

APPENDIX

Exhibit "B"

AFFIDAVIT

STATE OF FLORIDA)
)
COUNTY OF ORANGE) SS:

I, Robert Wayne Lee, being first duly sworn, allege and state, I am of lawful age, and under oath, do hereby swear or affirm:

1. I am the plaintiff in the case of Robert Wayne Lee, plaintiff vs. Baptist Medical Center of Oklahoma, and Scott Calhoon, M.D., defendants, said case being filed in the United States District Court for the Western District of Oklahoma, and bearing the number of CIV-88-354-T.

2. I affirmatively state that I never gave defendant Scott Calhoon, M.D., or anyone associated with defendant Calhoon or anyone associated with defendant, Baptist Medical Center, or anyone *period*, the consent nor the authorization to perform and/or test myself for exposure to the HTLV-III antigen (AIDS TEST) at anytime either before, during or after admittance to the Baptist Medial Center, Oklahoma for the procedures which are the basis of this lawsuit.

3. I affirmatively state that I had no reason to suspect my exposure to the HTLV-III antigen and had long since limited my activities so as to limit the possibility of exposure to the HTLV-IIi antigen and under the circumstances I would not have felt the need for such a test nor

consented to it, and under the circumstances the performance of the unauthorized test was an intentional interference with my own solitude and piece of mind.

4. I affirmatively state that the act of testing my blood without consent was an unauthorized prying into my private affairs by the fact that the results were made a matter of public record for the entire world to see.

5. I affirmatively state that I was never asked nor told that any type of test was going to be performed to determine my exposure to the HTLV-III antigen (AIDS TEST) while under the care of defendant, Calhoon, while at the Baptist Medical Center, Oklahoma.

6. Since no authorization was obtained it is my understanding that the test was not performed until the day after surgery and it was only upon my direct inquiry as to why I was placed in isolation that I become aware that any type of AIDS test had been performed on myself and also informed of the results of that test.

7. I affirmatively state that I was unaware that the taking of the unauthorized AIDS test would in any way be connected to the alleged medical malpractice lawsuit I filed until 10/31/88 when at my deposition Glen Huff, counsel for Baptist Hospital, made such an allegation. I in no way intentionally intended to waive the physician/patient privilege by the filing of the lawsuit for medical malpractice.

Further Affiant Sayeth Not.

/s/ Robert Wayne Lee
Robert Wayne Lee

Subscribed and sworn to before me this 3rd day of April, 1989.

/s/ Helen Marino
Notary Public

My Commission Expires:
NOTARY PUBLIC STATE OF
FLORIDA AT LARGE
MY COMMISSION EXPIRES
APR 22 1990

OKLAHOMA TEACHING HOSPITALS LABORATORIES

T-CELL SUBSETS

PATIENT INFORMATION:
NAME: LEE, Robert W.
MRNO: – 5011130871 BDATE: 38 y.o.
SEX: M LOCATION: Baptist Hospital CALHOON, S

SPECIMEN INFORMATION:
SPECIMEN: Whole Blood ACC#: 87FC4313
DATE COLLECTED: 5-5-87 RECEIVED: 5-6-87
PHYSICIAN: CALHOOM [SIC] PERFORMED: 5-6-87

INSTRUMENT INFORMATION:
SPECTRUM III/SYSTEM 50:III TECH ID: NW
PMT Gains: F.W. Scatter 48 Rt Scatter 280
GRN. Fluro. 650

RESULTS:

White Blood Cell Differential: Total WBC 8600 counts/ul
Lymphocytes 25.6% Monocytes 9.8% Granulocytes 64.6%

	Results % of Total Lymph.	Normal Range	Cell Count/ul	Mean Channel
Blank				48
(Pan T) OKT3	80.7	(64-78%)	1777	87
(Helper) OKT4	22.1	(35-48%)	487	70
(Suppress) OKT8	52.3	(21-34%)	1151	173
(E Rosette) OKT11	81.0	(73-85%)	1783	75
Ratio T4/T8	0.42	(1.19-2.23)		

SILVAN N GOLDMAN CENTER
OKLAHOMA BLOOD INSTITUTE

Ronald O. Gilcher, MD, F.A.C.P.
Director

1001 N. Lincoln Blvd.
Okla. City, OK. 73104
(405) 232-0670

036 3182
BAR CODE US DISEASE MARKER REQUEST FORM
0363182

OBI NUMBER: _____

PATIENT INFORMATION:
NAME: BMCO 441

SS# or
ID# _____

DIAGNOSIS: _____ AGE: _____ SEX: _____

SEND REPORT TO: _____
NAME AND TITLE

PHONE REPORT 949 6835
TELEPHONE #

HOSPITAL or CLINIC: Baptist

CITY STATE ZIP

ADDRESS: 3300 NW EXPY OKC OK 73112

PLEASE CHECK TEST REQUESTED:

___ HEPATITIS PROFILE
(includes HBsAg, Anti-HBc, Anti-HBs, Anti-HAV Ant-CIV, ALT)

		RESULT
_____	HBsAg	_____
_____	Anti-HBc	_____
_____	Anti-HBc IgM	_____
_____	Anti-HBs	_____
_____	Anti-HBeAg	_____
_____	Anti-HBe	_____

		RESULT
_____	Anti-HAV	_____
_____	Anti-HAV IgM	_____
_____	Anti-CNV	_____
_____	ALT	_____IU/L
X	Anti-HTLV-III	positive 8=18
_____	RPR	_____
	Western blot	positive p55
		p24, p32, p18

INTERPRETATION AND COMMENTS:

The concensus at the July 31, 1985 CDC-sponsored meeting on Anti-HIV (HTLV-III) testing at the NIH on the interpretation of Anti-HIV (HTLV-III) test results is as follows:

If the ratio of the optical density reading of the patient's sample to the cut-off value is:

≤ 2.0: Probably false positive
Repeat testing recommended in 2-3 months.

> 2.0 ≤ 7.0. Results are not conclusive
Repeat testing recommended in 2-3 months.

> 7.0:	Consider true positive (Western Blot testing is recommended for all positives).

(OBI USE ONLY) DATE AND TIME SAMPLE RECEIVED: 5/5/87 0100 TECH: 15

REPORTED BY PHONE: _____ TO: _____ TECH: _____

DATE MAILED: MAY 15 1987 CATEGORY: _____

NAME OR I.D. 0363182

State Lab No.
5963

DATE OF BIRTH ___ SEX ___
RACE ___

Date Received
5/6/87

DATE COLLECTED 5-3-87

TYPE OF SPECIMEN
X Serum _ Plasma

HTLV-III Antibody Test

[Human T-cell Lymphotrophic Virus type III]

Test Request: _ ELISA X Western Blot

Has patient been previously tested? _ Yes X No

This form will be returned to you to acknowledge receipt of specimen and its assigned identification number. Test results will be reported by this number only. YOU MUST MAINTAIN a confidential file for cross reference.

SEND REPORT TO:

Sylvan N. Goldman Center
Oklahoma Blood Institute
1001 N. Lincoln Blvd.
Oklahoma City, Ok 73104

Laboratory Service
Oklahoma State Department of Health
1000 NE 10th Street, P.O. Box 24106
Oklahoma City, Oklahoma 73124

ODH Form No. 229

State Lab No.
5963

Date Received
5/6/87

HTLV-III Antibody Test

[Human T-cell Lymphotrophic Virus type III]

Test Request: _ ELISA X Western Blot

Has patient been previously tested? _ Yes X No

MAY 8 1987

SEND REPORT TO:

Sylvan N. Goldman Center
Oklahoma Blood Institute
1001 N. Lincoln Blvd.
Oklahoma City, Ok 73104

TEST RESULTS

HTLV-III ELISA

_ Reactive

_ Nonreactive

WESTERN BLOT

X Antibody Detected

_ Antibody NOT Detected

PSS 3D
41 18
ODH Form No.
229

Laboratory Service
Oklahoma State Department of Health
1000 NE 10th Street, P.O. Box 24106
Oklahoma City, Oklahoma 73124

[p. 25] limited by an order of the court as to the scope of this discovery and I feel that it is our obligation to comply with the order of the court as to the scope of this discovery.

MS. WISDOM: I am trying to determine when responsibility is turned over. If at the time Mr. Lee goes into the emergency room, he is under the control of Baptist employees, that's one thing; then, when a physician-on-call is called in and care is turned over to that physician, it becomes an entirely different amount of responsibility and an entirely different ball game.

MR. HUFF: Why don't I suggest this. Whether than us arguing back and forth about it, perhaps you can ask Mr. Hupfeld if he knows how that responsibility is divided or split up. I have a hunch we're arguing about something that he may well not know.

Q. (By Ms. Wisdom) It's my understanding, Mr. Hupfeld, that you testified previously that the admitting physician had responsibility for the patient, is that not correct?

A. I think the operative word was generally.

Q. Who do you consider to be the admitting physician, the emergency room doctor or the private physician or the physician-on-call?

A. Again, generally, the physician that admits the patient to the hospital is not the emergency room physician.

[p. 26] Q. And at the time that Mr. Lee was admitted to the hospital, what was your understanding of who

was responsible for a patient once they were admitted to the hospital?

MR. PAULL: Object to the form. I'm objecting to the form. Responsible in what way; for his bills, for his medical care, for his surgical care, for his internal medical care, for his radiology care?

Q. (By Ms. Wisdom) who was responsible for his medical care?

MR. HUFF: Can you answer that question in that fashion?

THE WITNESS: Only in the broadest sense.

A. Generally, it's assumed that the attending – and the attending is often the admitting, but not necessarily – he's responsible for the care of the patient.

Q. (By Ms. Wisdom) And at the time that Mr. Lee was admitted to the hospital, what person would have authority to discharge him?

A. Again, that, as has been stated, that represents a myriad of circumstances dependent upon whether the patient was admitted by an internist and was operated on, whether the patient was admitted by a surgeon, was operated on and then turned over to someone else for internal medicine care. The answer is as broad as the circumstances that allow patients [p. 27] to come into this institution. There is no singular answer.

Q. I realize that, Mr. Hupfeld, but generally, when someone comes into your hospital, somebody has to authorize him to come in, correct?

A. Correct.

Q. And generally, that person that authorizes him to come in is the one who discharges him, correct?

A. Generally.

Q. Generally, correct. You don't just put somebody in this hospital and then he just floats around here with nobody watching over him, correct?

MR. HUFF: Counsel, I'm going to object to your sarcasm. This witness is trying to answer as accurately as possible. And although, generally, patients come in the hospital being admitted by one physician and being discharged by that physician, it is a very common practice for that not to occur. Now, you seem to be very sarcastic about the witness trying to point that out to you.

MS. WISDOM: Well, the witness is being cooperative, it's counsel that's trying to split hairs. The general policy is all I'm asking.

MR. HUFF: Generally?

Q. (By Ms. Wisdom) Generally, does not one doctor admit a patient and discharge a patient?

MR. HUFF: If you're talking about generally

* * *